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No. 80-1349

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON,

PETITIONER,

v.

NEIL MARTIN CHRISMAN,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Did the questions presented as framed by the petitioner present the issues on which this case should be decided?

2. Was this case decided on the Washington State Constitution or was it the intent of the Washington State Supreme Court to do so?

3. Was the dormitory room of the defendant opened as a result of a violation of any constitutional rights of Mr. Overdahl, thereby preventing a voluntary surrender of the expectation of privacy?

4. Was the entry of Officer Daugherty into the dorm room justified under a combination of his "open view" observations and the exigent circumstances that existed?

5. Was it necessary for the officer to strictly comply with the requirements of the "knock and announce rule"?

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CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution 1,5,6 7,13

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OPINIONS BELOW

See statement as to opinions below set forth at page 1 of Brief of Petitioner.

JURISDICTION

See statement as to jurisdiction set forth at pages 1 and 2 of Brief of Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED IN REVIEW

The Federal Constitutional provision involved in review is the Fourth Amendment to the United States Constitution which provides as follows:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Washington State Constitutional provision, involved in this case is Article I, Section 7, which states as follows:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

STATEMENT OF THE CASE

See Statement of the Case as set forth at pages 2-14 of Brief of Petitioner.

ARGUMENT

I.
THE QUESTIONS PRESENTED AS FRAMED BY THE PETITIONER ARE THE ISSUES ON WHICH THIS CASE SHOULD BE DECIDED.

At page eight of the respondent's brief, the respondent hereinafter referred to as defendant, asserts that the case at bar was not a situation where Mr. Overdahl was "allowed" to return to his room. The plain fact of the matter is that Mr. Overdahl was the one who suggested that he be allowed to return to his room to obtain

identification. The officer acting in a professional manner advised him that he could return but that the officer would have to accompany him, due to his arrest status. The return to the room was not, as counsel for the defendant suggests, for the purpose of obtaining evidence, but was simply to obtain identification. Mr. Overdahl could not realistically be released prior to some verification of his identity.

Allowing Mr. Overdahl to return to his dorm room was a matter of convenience to allow him to properly identify himself in order to avoid being taken down to the station house and being booked and processed there. If it was the officer's intention to obtain proof of age of Mr. Overdahl as opposed to his real purpose of verifying the identity, he would not have had to go any further than the point at which they were waiting for the elevator to carry them

upstairs since Mr. Overdahl had at that point (prior to their ascent in the elevator) indicated that he was underage.

It is additionally noted that the officer entered the room less than a minute after Mr. Overdahl's entry into the room. The entry was a contemporaneous, if not a simultaneous entry.

II.

THIS CASE WAS NOT DECIDED ON THE WASHINGTON STATE CONSTITUTION NOR WAS IT THE INTENT OF THE WASHINGTON SUPREME COURT TO DO SO.

The defendant at page 13 through 17 of his brief argues that the case could be decided in the defendant's favor under the provisions of the Washington State Constitution. For this proposition the defendant cites State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980). However, it appears that State v. Simpson, supra, is limited in its application to the question of whether or not the Washington Constitu-

tion affords more protection as far as "standing" than does the Fourth Amendment to the United States Constitution. The Washington State Supreme Court in State v. Simpson, supra, simply rejected the limitations placed on standing by this court as stated in Rakas v. Illinois, 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978). It is the petitioner's position that the application of State v. Simpson, supra, is in fact limited to the issue of standing. The limitation of the applicability of State v. Simpson, supra, is easily seen when one reviews a prior Washington State Supreme Court decision. In State v. Smith, 88 Wn.2d 127, 133, 559 P.2d 970 (1977), the Washington State Supreme Court, at page 133, stated:

> It is apparent that the fourth amendment to the United States Constitution and article I, section 7 of the Washington State Constitution are comparable and are to be given comparable constitutional interpretation and

> effect. Accordingly, in this opinion, reference will be made only to the Fourth Amendment. [sic]

The Washington State Supreme Court in State v. Christian, 95 Wn.2d 655, 658-659, 628 P.2d 806, 808-809 (1981), in determining whether a warrantless search and seizure was reasonable rendered its decision upon its interpretation of the Fourth Amendment to the United States Constitution. There was no indication by the court that a different result would be dictated by Article I, Section 7 of the Washington State Constitution even though at the trial court level the defendant had argued that the search was unreasonable or in violation of both the Fourth Amendment to the United States Constitution or Article I, Section 7 of the Washington State Constitution.

A careful reading of the Washington State Supreme Court's opinion in the case

at bar discloses that the decision rests on the court's interpretation of what the Fourth Amendment to the United States Constitution requires. There was no effort by the court to decide the matter pursuant to the Washington State Constitutional provision; see State v. Chrisman, 94 Wn.2d 711, 619 P.2d 971 (1980).

III.

THE DORMITORY ROOM WAS NOT OPENED AS A RESULT OF A VIOLATION OF ANY CONSTITUTIONAL RIGHTS, AND THEREFORE THE EXPECTATION OF PRIVACY WITHIN THE DORMITORY ROOM WAS VOLUNTARILY SURRENDERED.

The defendant makes a rather elaborate argument premised on a supposed violation of the constitutional rights of Mr. Overdahl; see Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966). The defendant attempts to misconstrue the officer's request for identification as a request for proof of age. It was Mr.

Overdahl's desire to return to his room for the purpose of expediting his own release. It was not the officer's idea for him to return to the room, nor was it the officer's idea for him to leave the door of the room in such a substantially open position as to expose its interior to the "open view" of the officer standing in the public hallway. The mere fact that the officer acquiesed in Mr. Overdahl's request to return to his room and placed reasonable restrictions on that return does not alter the fact that Mr. Overdahl was allowed, for his own convenience, to return.

There was no intention on the officer's part to obtain incriminating evidence, such as proof of age, as a result of Mr. Overdahl's return to his dorm room. Therefore, there was no violation of Mr. Overdahl's constitutional right to remain silent. Additionally, Officer Daugherty took no

action reasonably likely to elicit an incriminating response from Mr. Overdahl; see Rhode Island v. Innis, 446 U.S. 291, 64 L.Ed.2d 297, 100 S.Ct. 1682 (1980); but rather it was Mr. Overdahl who initiated the request and action to return to his room. The officer merely "allowed" Mr. Overdahl to return to his room. Therefore, the expectation of privacy within the dormitory room was voluntarily exposed and consequently surrendered by the actions of Mr. Overdahl.

The defendant conveniently overlooks the fact that Mr. Overdahl had indicated to the officer that he was going to his room for identification with the presumed intention of proving his identity to the officer. The mere fact that the officer insisted that he must accompany Mr. Overdahl to the room because of Mr. Overdahl's arrest status has no constitutional signi-

ficance in regards to the constitutional right to remain silent. The result presumably would have been the same whether or not the officer would have accompanied him to the room or not. Therefore, it is a frivolous argument to say that the production of the identification which was Mr. Overdahl's own idea is somehow an issue of constitutional magnitude.

IV.

OFFICER DAUGHERTY'S ENTRY INTO THE RESIDENCE WAS JUSTIFIED UNDER A COMBINATION OF THE "OPEN VIEW DOCTRINE" AND THE EXIGENT CIRCUMSTANCES THAT EXISTED.

Starting at page 31 of defendant's brief, the defendant questions the right of the officer to protect himself from any potential weapons. What the defendant conveniently overlooks is that the officer had no way of knowing (1) what items were located in the premises he had allowed Mr. Overdahl to return to or (2) anything whatsoever about the other occupant of the

room, Mr. Chrisman, the defendant herein, including but not limited to defendant's mental condition, prior criminal history, etc.

At page 34 of his brief, the defendant infers that the officer, at the time he entered the room, did not have probable cause to believe the substance he had seen in "open view" was in fact contraband. It is clear from the records regardless of defense counsel's assertions in his brief, that the officer at the time believed what he saw was in fact contraband and that he did have probable cause to believe what he saw was contraband. The officer then entered the room and upon observing the contraband more closely determined that it was in fact contraband. The trial court clearly indicated that the seeds in question did not appear to be anything but marijuana (contraband) and noted that they

did not look like any common variety of seeds that the court had ever seen. Clearly, when Officer Daugherty entered the room he believed what he had seen during his "open view" were in fact marijuana seeds. He did not enter the room to "examine the seeds to see if they were marijuana". The officer therefore was entitled to enter the premises based on the totality of the circumstances that existed, the exigent circumstances, and seize the items in question.

The petitioner in its previous brief has essentially discussed why it feels exigent circumstances existed. Suffice it to say that unlike the situation in Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978), Officer Daugherty's actions extended to simply seizing contraband that was already in "open view". There was no desire or intention to do an extensive

search of the premises, although a search was conducted subsequent to the initial seizure. That search, however, was conducted pursuant to a consent to search. For all practical purposes the least intrusive thing Officer Daugherty could have done in the situation was to enter the room and seize the items in open view. Anything he could have practically done to secure the area to make the obtaining of the search warrant effective would have been a greater intrusion under the Fourth Amendment than the simple seizure which could be accomplished quickly and very unobtrusively.

V.

THE EVIDENCE SHOULD NOT BE SUPPRESSED BECAUSE THE POLICE OFFICER DID NOT COMPLY WITH WITH THE "KNOCK AND ANNOUNCE RULE" SINCE TO COMPLY WOULD HAVE BEEN A USELESS GESTURE.

It is submitted for the officer to have knocked and announced in formal com-

pliance with the "knock and announce rule" would have been a futile and useless administrative gesture. His physical presence was clearly known not only to Mr. Overdahl who lead him up to the room, but to the defendant, Mr. Chrisman, after Mr. Overdahl basically fully opened the door of the premises. Clearly, to require the officer to have knocked and announced in this particular situation would have been simply the exercise of a "mere ritual".

It is noted that the Washington Appellate Courts have held that strict compliance with the "knock and announce rule" is not always required; see State v. Haggarty, 20 Wn.App. 335, 579 P.2d 1031 (1978), review denied 91 Wn.2d 1011 (1979).

Although in State v. Coyle, 95 Wn.2d 1, 11, 621 P.2d 1256 (1980), the Washington Supreme Court did not excuse failure to

comply with the "knock and announce" rule it did acknowledge that compliance with the rule may not be necessary in a case where to do so would be a "useless" gesture. This court has indicated that compliance with the knock and announce rule would probably be excused where it was "virtually certain" the occupants were aware of the officer's presence, identity and purpose prior to the officer's entry; see Miller v. United States, 357 U.S. 301, 310, 2 L.Ed.2d 1332, 78 S.Ct. 1190 (1950). Clearly, in the case at bar, the defendant was aware of the officer's presence, identity and as shown by the defendant's responses to the officer's presence prior to entry into the room by the officer, was aware of one of the reasons which caused the officer to enter the room.

In United States v. Bustamante-Gamez, 488 F.2d 4 (9th Cir., 1973), cert. denied

416 U.S. 970 (1974), the court, at page 9, discussed the purposes of 18 U.S.C. Sec. 3109, which it referred to as the "rule of announcement" and listed three interests to be served by the rule of announcement ("knock and announce" rule) as follows:

> . . . (1) it reduces the potential for violence to both the police officers and the occupants of the house into which entry is sought; (2) it guards against the needless destruction of private property; and (3) it symbolizes the respect for the individual privacy summarized in the adage that "a man's house is his castle". See Miller v. United States, 1958, 357 U.S. 301, 307, 313 n. 12, 78 S.Ct. 1190, 1194, 2 L.Ed.2d 1332; Note, Announcement in Police Entries, 80 Yale L.J. 139, 140-41 (1970).
>
> Nonetheless, it has never been suggested that the requirement is an inflexible one; both at common law and in the constitutional context the courts have acknowledged that the interests enumerated above may give way to other considerations. While the limits of these exceptions are by no means clear, they generally stem from the exigencies of law enforcement or involve situations in which compliance with the rule would be mere ritual. See Ker v. California, supra, 374 U.S. at 38-41, 83 S.Ct. 1623 (opinion of Clark, J.); id. at

54-60, 83 S.Ct. 1623 opinion of Brennan, J.); Note, No-Knock and the Constitution: The District of Columbia Court Reform and Criminal Procedure Act of 1970, 55 Minn.L.Rev. 871, 876-86 (1971). In short, 'a claim under 18 U.S.C. Sec. 3109 depends upon the particular circumstances surrounding the [entry].' Jones v. United States, 1960, 362 U.S. 257, 272, 80 S.Ct. 725, 737, 4 L.Ed.2d 697. Judged by these standards, we hold that the entry into the garage did not violate the statute. (emphasis supplied).

Strict application of the "knock and announce" rule in the case at bar would not further any of the three interests enumerated above.

CONCLUSION

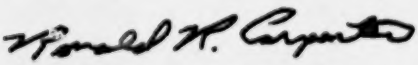
Officer Daugherty's entry into the dorm room was proper, since (1) his presence at the door was not the result of unconstitutional activity on the officer's part; (2) Mr. Overdahl had voluntarily surrendered the privacy of the occupants by leaving the door in the

open posture, thereby exposing the interior of the dorm room; (3) the open view given to the officer allowed him to properly obtain probable cause to believe what he saw was contraband; (4) because of the exigent circumstances which existed, he had authority to enter the premises; and additionally (5) his entry onto the premises was justified to accompany Mr. Overdahl who was in arrest status.

Additionally, since the officer's presence, identity and purpose were apparant to Mr. Overdahl and the defendant prior to the officer's entry into the premises, such entry was not a violation of the "knock and announce" rule. Therefore, the evidence seized as the result of the officer's entry should not have been suppressed. The judgment of the Washington State Supreme Court, insofar as it suppressed the evidence and reversed the conviction

of the defendant, NEIL MARTIN CHRISMAN, the respondent herein, should be reversed; the decision of the trial court and the Washington State Court of Appeals should be affirmed and reinstated.

Respectfully submitted,



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